Supreme Court, U.S.
FILED

(1) 96 338 AUG 29 1996

No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1996

BURTON KAHN,

Petitioner

v.

BEICKER ENGINEERING, INC., DAVY L. BEICKER AND MICHAEL J. ZEZULA.,

Respondents

On Petition For Writ of Certiorari To The Supreme Court of Texas

PETITION FOR A WRIT OF CERTIORARI

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33 pp

QUESTIONS PRESENTED

Is the State action, of depriving a citizen of his property at a hearing in which he was not afforded notice at a meaningful time and in a meaningful manner, a violation of Due Process Clause of the Fourteenth Amendment of the Constitution of the United States?

Does the suppression of material and crucial evidence relating to Due Processs, by a state appellate court, who then based its denying opinion on the lack of that evidence, a violation of Due Process Clause of the Fourteenth Amendment of the Constitution of the United States?

TABLE OF CONTENTS

QUESTIONS PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
OPINIONS BELOW 1
JURISDICTION 2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2
STATEMENT 5
REASONS FOR GRANTING PETITION 8
A. Due Process right to opportunity to be heard prior to the deprviation of property 8
B. Suppresion of material evidence is a violation of Due Process Clause of the Fourteenth Amendment 10
CONCLUSION 11
APPENDIX
Texas Supreme Court denying Petition 1a
Court of Appeals opinion 2a-6a
Order Granting Special Exceptions 7a
Order of Dismissal 18a
Order Denying Motion For Reinstatment 9a
Order Denying Plaintiff's Motion For New Trial 10a
Texas Supreme Court overruling Motion for Rehearing of Petition 11a
Court of Appeals denial of Rehearing EN BANC 12a
Cerified Copy of Affidavit 13a-14a
Motion to Reinstate 15a-16a

TABLE Of AUTHORITIES

Cases

Armstrong v. Manzo, 380 US 545, 552, 14 L Ed 2d 62,
85 S Ct 1187 (1965).....6,8,10
Boddie v. Connecticut, 401 U.S. 371, 379, 28 L Ed 2d 113
,91 S Ct 780 (1971).....9
Brady v. Maryland, 373 US 83, 10 L Ed 2d 215,
83 S Ct 1194 (1963).....7,10
Cleveland Board of Education v. Londermill,
470 U.S. 532, 543 (1985).....10
Coe v. Armour Fertilizer Works, 237 US 413, 423,
59 L Ed 1027, 35 S Ct 625 (1915).....10
Fuentes v. Shevin, 407 US, at 80-81,32 L Ed 2d 556,
92 S Ct (1983).....9
Grannis v. Ordean, 234 U. S. 385.....9
Kinsella v. United States ex rel. Singleton, 361 U.S. 234,
4 L Ed.2d 268, 80 S.Ct. 297 (1960).....11
Logan v. Zimmerman Brush Co., 455 US 422, 428,
71 L Ed 2d 265, 102 S Ct 1148 (1982).....7
Milliken v. Meyer, 311 U. S. 457 9
Mullane v. Central Hanover Bank & Trust Co.,
339 US 306, 94 L Ed 865, 70 S Ct 652 (1950).....7,8
Pennoyer v. Neff, 95 U.S. 714, 732-33 (1878).....8
Peralta v. Heights Medical Center, Inc., 485 US 80, 84,
99 L Ed 2d 75, 108 S Ct 896 (1988).....6,10
Priest v. Las Vegas, 232 U. S. 604 9
Roller v. Holly, 176 U. S. 398 9
United States v. Good Real Property, 510 US ___,
126 L.Ed 2d 490, 503, 114 S.Ct. 492, (1993).....9
Washington v. Harper, 494 US 210,235,
108 L Ed 2d 178, 110 S Ct 10280 (1991).....9

Other Authorities

U.S.Const. amend. XIV 2,7,8,9,10
Tex.R.Civ.P. 21 2,5
Tex.R.Civ.P. 21a 3,6
28 U.S.C. 1257(2) 2

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Burton Kahn respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Texas.

OPINIONS BELOW

The Supreme Court of Texas did not issue an opinion. (*See* App. *infra* at 1a)

The Court of Appeals for the Fourth Supreme Judicial District of Texas opinion, affirming the trial court decision, was unpublished. Appeal No. 04-94-00823-CV entitled BURTON KAHN v. BEICKER ENGINEERING, INC., Davy L. BEICKER and Michael J. ZEZULA. (*See* App. *infra* at 2a-6a).

The 166th District Court of Bexar County did not issue an opinion.

JURISDICTION

The Supreme Court of Texas denied Petitioner's application for a writ of error on April 25,1996. (*See* App. *infra* at 1a). On May 31,1996, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error. (*See* App. *infra* at 11a).

Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV, Section 1, provides:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rule 21 of the Texas Rules of Civil Procedure provides:

Filing and Serving Pleadings and Motions. Every pleading, plea, motion or application to the court for an order, whether in the form of a motion, plea or other form of request, unless presented during a hearing or trial, shall be filed with the clerk of the court in writing, shall state the grounds therefor, shall set forth the relief or order sought, and at the same time a true copy shall be served on all other parties, and shall be noted on the docket. An application to the court for an order and notice of any hearing thereon, not presented during a hearing or trial, shall be served upon all other parties not less than three days before the time specified for the hearing, unless otherwise provided by these rules or shortened by the court. If there is more than one other party represented by different attorneys, one copy of such pleading shall be delivered or mailed to each attorney in charge. The party, or attorney of record, shall certify to the court compliance with this rule in writing over signature on the filed pleading, plea, motion or application. After one copy is served on a party, that party may obtain another copy of the same pleading upon tendering reasonable payment for copying and delivering.

Rule 21a of the Texas Rules of Civil Procedure provides:

Methods of Service. Every notice required by these rules, and every pleading, plea, motion, or other form of request required to be served under Rule 21, other than the citation to be served upon the filing of a cause of action and except as otherwise expressly provided in these rules, may be served by delivering a copy to the party to be served, or the party's duly authorized agent or attorney of record, as the case may be, either in person or by agent or by courier receipted delivery or by certified or registered mail, to the party's last known address, or by telephonic document transfer to the recipient's current telecopier number, or by such other manner as the court in its discretion

may direct. Service by mail shall be complete upon deposit of the paper, enclosed in a postpaid, properly addressed wrapper, in a post office or official depository under the care and custody of the United States Postal Service. Service by telephonic document transfer after 5:00 p.m. local time of the recipient shall be deemed served on the following day. Whenever a party has the right or is required to do some act within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail or by telephonic document transfer, three days shall be added to the prescribed period. Notice may be served by a party to the suit, an attorney of record, a sheriff or constable, or by any other person competent to testify. The party or attorney of record shall certify to the court compliance with this rule in writing over signature and on the filed instrument. A certificate by a party or an attorney of record, or the return of an officer, or the affidavit of any person showing service of a notice shall be prima facie evidence of the fact of service. **Nothing herein shall preclude any party from offering proof that the notice or instrument was not received**, or, if service was by mail, that it was not received within three days from the date of deposit in a post office or official depository under the care and custody of the United States Postal Service, and upon so finding, the court may extend the time for taking the action required of such party or grant such other relief as it deems just. The provisions hereof relating to the method of service of notice are cumulative of all other methods of service prescribed by these rules. On expiration of the time within which the trial court has plenary power, a judgment cannot be set aside by the trial court except by bill of review for sufficient cause, filed within the time allowed by law; provided that the court may at any time correct a clerical error in the record of a judgment and render a judgment nunc pro tunc under Rules 316 and 317, and may also sign an order declaring a

previous judgment or order to be void because signed after the court's plenary power has expired. **[emphasis added]**

STATEMENT

Petitioner Burton Kahn (hereinafter "Kahn") filed suit against Beicker Engineering, Inc., Davy L. Beicker and Michael J. Zezula (hereinafter "Beicker"). The suit was a libel and defamation suit based on three letters writen by Beicker to Bexar County, Texas concerning the adequacy of a certain concrete slab engineered by Kahn. Beicker filed two identical First Amended Original Answers: one on July 30 and the other on August 3, 1994. Beicker filed the August 3, Answer in the District Court that had for the last page a fiat setting a hearing on Beicker's special exception. Kahn received the August 3, 1994, Answer but claims he did not receive the last page that contained the notice of hearing and swore to it in an affidavit. Kahn failed to appear at the special exception hearing. The trial court sustained Beicker's special exception and gave Kahn ten days to amend his petition and failure to amend his petition would result in the petition being dismissed with prejudice.(*See* App. *infra* at 7a.) Although he received the order granting the special exception, Kahn failed to amend his pleadings. On August 25, 1994, a hearing was held to hear Beicker's motion to dismiss. Kahn did not receive notice of the hearing, nor was there a notice of hearing filed with the District Clerk. At this hearing, the trial court sustained Beicker's motion to dismiss Kahn's cause of action with prejudice. (*See* App. *infra* at 8a.) This in fact was an Ex-Parte hearing and decision without Kahn having an opportunity to be heard.

Texas Rules of Civil Procedure Rule 21 provides that a notice is to be sent to all parties upon all applications to the court. The only type of notice Kahn received was in the Special Exception Order, (*See* App. *infra* at 7a) which gave Kahn 10

days to replead. The Court of Appeals for the Fourth Supreme Judicial District of Texas ("Appellate Court") stated at (*See* App. *infra* at 6a) that:

> *"In the Order Granting Special Exception, however, the trial court specifically states "in the event Plaintiff fails to amend his Petition in conformity with this Order within 10 days from date hereof, this law suit shall be dismissed with prejudice as to the refiling of same.,' Judge McManus signed this order on August 12,1994. Kahn, who acknowledges receipt of this document, was thus put on notice by the trial court as to the consequences of not amending his pleadings."*

This so called notice was not at a meaningful time nor in a meaningful manner to give Kahn an opportunity to be heard and explain to the trial court that Kahn did not have notice and the confusion of the Special Exceptions. ***Peralta v. Heights Medical Center, Inc.***, 485 US 80, 84, 99 L Ed 2d 75, 108 S Ct 896 (1988), ***Armstrong v. Manzo***, 380 US 545, 550, 14 L Ed 2d 62, 85 S Ct 1187 (1965)

Kahn filed a Motion to Reinstate (*See* App. *infra* at 15a) in the trial court and attached an affidavit (*See* App. *infra* at 13a), stating that he did not have notice of the hearing, which countered the presumption that the answer included a notice. Texas Rules of Civil Procedure Rule 21a provides that a party can offer proof that the notice or instrument was not received. Kahn also presented evidence that there were clerical errors in these proceedings by Beicker. The District Court disregarded the affidavit of Kahn stating that there was no notice and denied Petitioner's Motion to Reinstate. (*See* App. *infra* at 9a.) The District Court denied Petitioner's Motion for New Trial. (*See*

App. *infra* at 10a). The Appellate Court stated in an unpublished opinion (*See* App. *infra* at 6a) that:

> *"Kahn has failed to bring forth any verified proof that he did not receive notice from Beicker and has therefore failed to rebut the presumption that the document was received."*

The Appellate Court did not attack the affidavit as faulty but suppressed it. In a motion for rehearing, Kahn attached a certified copy of the affidavit from transcript sent to the Appellate Court. The Appellate Court En Banc overruled the rehearing. (*See* App. *infra* at 13a). The Texas Supreme Court denied Kahn's application for writ of error without an opinion. (*See* App. *infra* at 1a). The Appellate Court's suppression of this material evidence is a much greater violation of the Due Process Clause in the Fourteenth Amendment to the United States Constitution than a prosecutor's violation of suppressing material evidence. ***Brady v. Maryland***, 373 US 83, 10 L Ed 2d 215, 83 S Ct 1194 (1963).

Kahn, a natural born citizen of the United States and veteran of the United States Army, represented himself in this action. Because Kahn was acting in this case as a pro-se, all the courts below suppressed the conclusive and material evidence that Kahn did not receive notice and disregarded his constitutional rights of the Due Process Clause of the Fourteenth Amendment. Kahn's property is his tort claim against Beicker and that his property was taken without due process of law as per the Fourteenth Amendment to the Constitution of the United States. ***Logan v. Zimmerman Brush Co.***, 455 US 422, 428, 71 L Ed 2d 265, 102 S Ct 1148 (1982); ***Mullane v. Central Hanover Bank & Trust Co.***, 339 US 306, 94 L Ed 865, 70 S Ct 652 (1950). Not only did Kahn have his property at stake, but he

had a liberty interest as well in protecting his "good name, and reputation,

REASON FOR GRANTING THE WRIT

A. Due Process right to have opportunity to be heard prior to the deprivation of property.

This Court has had a long history of protecting citizens of their due process rights and their right of opportunity to be heard prior to the deprivation of their property. This tradition should continue.

It is axiomatic that the Fourteenth Amendment forbids the exercise of judicial power without notice to the defendant and an opportunity to be heard. To bound a defendant without notice would be contrary to the first principles of justice. ***Pennoyer v. Neff***, 95 U.S. 714, 732-33 (1878).

In ***Armstrong v. Manzo***, 380 US 545, 550, 14 L Ed 2d 62, 85 S Ct 1187 (1965) the Court stated:

> "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." ***Mullane v. Central Hanover Tr. Co.***, 339 U. S. 306, at 313. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford

them an opportunity to present their objections. ***Milliken v. Meyer***, 311 U. S. 457; ***Grannis v. Ordean***, 234 U. S. 385; ***Priest v. Las Vegas*** . 232 U. S. 604; ***Roller v. Holly***, 176 U. S. 398. . . ." *Id.*, at 314. "

Yet notice and an opportunity to be heard before property is taken is the "root requirement" of the Due Process Clause. ***Boddie v. Connecticut***, 401 U.S. 371, 379, 28 L Ed 2d 113, 91 S Ct 780
1971).

In ***Washington v. Harper***, 494 US 210,235, 108 L Ed 2d 178, 110 S Ct 10280 (1991) this Court stated: the opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." ***Armstrong v. Manzo***, 380 US 545, 552, 14 L Ed 2d 62, 85 S Ct 1187 (1965).

In ***United States v. Good Real Property***, 510 US ___, 126 L.Ed 2d 490, 503, 114 S.Ct. 492 (1993) this Court stated:

> "The right to prior notice and a hearing is central to the Constitution's command of due process. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment-to minimize substantively unfair or mistaken deprivations of property....." ***Fuentes v. Shevin***, 407 US, at 80-81,32 L Ed 2d 556, 92 S Ct (1983)"

The question comes to mind that if Kahn did have an opportunity to explain to the trial court that he did not receive notice of the original hearing, the judge might have dismissed the case anyway.

In ***Peralta v. Heights Medical Center, Inc.***, 485 US 80, 86, 99 L Ed 2d 75, 108 S Ct 896 (1988), this Court stated "it is no answer to say that in this particular case due process of law would have led to the same result because he had no defense on the merits." ***Coe v. Armour Fertilizer Works***, 237 US 413, 423, 59 L Ed 1027, 35 S Ct 625 (1915)

Moreover, as this Court emphasized in ***Cleveland Board of Education v. Londermill***, 470 U.S. 532, 543 (1985), notice and an opportunity to be heard prior to the deprivation is necessary "even if the facts are clear."

Thus this Court should grant the writ of certiorari, whether or not the trial court would have ordered dismissal because "only that would have wiped the slate clean. Only that would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place." ***Armstrong v. Manzo***, 380 US 545, 552, 14 L Ed 2d 62, 85 S Ct 1187 (1965)

B. Suppression of material evidence is a violation of Due Process Clause of the Fourteenth Amendment

This Court should consider, that the Appellate Court's suppression of material evidence is a much greater violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution than a prosecutor's violation of suppressing material evidence. ***Brady v. Maryland***, 373 US 83, 10 L Ed 2d 215, 83 S Ct 1194 (1963).

Here the Judiciary, whose job is to be fair and unbiased, has chosen to suppress this evidence. This act of unfairness and biased constitutes a denial of due process to a very high degree.

This Court stated in ***Kinsella v. United States ex rel. Singleton***, 361 U.S. 234, 4 L Ed. 2d 268, 80 S.Ct. 297 (1960), that "Due process cannot create or enlarge power. * * * It has to do, as taught by the Government's own cases, with the denial of that fundamental fairness, shocking to the universal sense of justice."

Certainly, the proceedings complained of here cannot be characterized as fundamentally fair and the decisions in this case are very shocking to the universal sense of justice.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully

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APPENDICES

THE SUPREME COURT OF TEXAS

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April 25,1996

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RE: Case Number 95-1282
Style: BURTON KAHN
V.
BEICKER ENGINEERING, INC., DAVY L. BEICKER, AND MICHAEL J. ZEZULA

Dear Counsel:

Today, the Supreme Court of Texas denied the above referenced application for writ of error with the notation "Writ Denied".

Respectfully yours,

JOHN T. ADAMS, CLERK
BY:/s/Michael C. Murphey, Deputy Clerk

cc: Mr. Burton Kahn

Court of Appeals
Fourth District of Texas
San Antonio

* * * * * *

OPINION

Appeal No. 04-94-00823-CV

Burton KAHN,
Appellant,

V.

BEICKER ENGINEERING, INC., Davy L. BEICKER
and Michael J. ZEZULA,
Appellees.

Appeal from the 166th District Court of Bexar County
Trial Court No. 94-CI-07723
Honorable Don McManus, Judge Presiding

Opinion by: Sarah B. Duncan, Justice

Sitting: Alma L. Lopez, Justice
Paul W. Green, Justice
Sarah B. Duncan, Justice

Delivered and Filed: October 18, 1995 AFFIRMED

This appeal arises out of the dismissal of Kahn's suit for failure to amend his pleadings in accordance with the trial court's order granting Beicker Engineering's, Inc., Davy L. Beicker's, and Michael J. Zezula's (Beicker), special exception. In seven points of error, Kahn argues that the trial

court abused its discretion in granting Beicker' 5 special exception and erred in dismissing his suit without adequate notice. We affirm.

FACTS

Contour Construction, Kahn's employer, contracted with Bexar County to build the Gardendale Community Center. To reduce the cost of the project, Kahn suggested a design change, which was approved by the county, for the concrete slab on the ground. After the slab was in place, Bexar County and Contour Construction began to argue over the adequacy of the slab. The county hired Beicker to resolve the dispute. Beicker reported that the slab did not meet certain specified criteria.

Kahn filed suit against Beicker based on correspondence between Beicker and the county concerning the adequacy of the concrete slab. According to Kahn, Beicker made "irresponsible and intentional derogatory comments.,' After Kahn filed his petition, Beicker filed its answer and then filed a First Amended Original Answer on July 29, 1994, that contained a special exception. No fiat was attached to this answer. On August 3, 1994, Beicker filed another First Amended Original Answer that included a fiat setting a hearing on his special exception. Both answers were sent by certified mail, return receipt requested.

Due to Kahn's failure to appear at the special exception hearing, the trial court sustained Beicker's special exception and gave Kahn ten days to amend his petition with notice that failure to do so would result in the petition being dismissed with prejudice. Although he received the order granting the special exception, Kahn failed to amend his pleadings. On August *25,* 1994, the trial court dismissed Kahn's cause of action with prejudice.

SPECIAL EXCEPTION

In his first four points of error, Kahn argues that the trial court erred in granting Beicker's special exception because Rule 71, Tex. R. *Civ.* P., does not apply; it was a general demurrer; the pleadings are of such detail that they can stand on their own; and the pleadings include other causes of action besides libel. We agree with Kahn that Rule 71 does not apply. We disagree, however, with Kahn's other arguments.

In his Original Petition, Kahn sued Beicker for "libel, commercial disparagement, trade libel, intentional infliction of emotional distress, intentional interference with [Kahn's] prospective business advantage and for malice ... ." He then gave a summary of operative facts. Beicker generally denied ail the allegations in his Original Answer and filed a special exception in his First Amended Original Answer. The special exception states:

> Defendants specially except to paragraph 2.4 and paragraphs 3.1 through 3.7 of Plaintiff's Original Petition, because Plaintiff falls to state a cause of action for libel. ... However, the pleading totally fails to state a legally cognizable cause of action for the reason that the petition falls to allege, with any specificity, the elements of the cause of action for libel. No allegedly defamatory words employed by Defendants are identified. There is no identification of any person(s) to whom the allegedly defamatory words were published, nor on what date(s) the publication(s) may have occurred.

The exception points out the particular pleading excepted to and points out the defect in the plaintiff's pleading. *See* Tex. R. Civ. P.91. Because Beicker specifically pointed out the defects in Kahn's petition, it is not a prohibited general demurrer. Points of error one and two are overruled.

Kahn also argues that his pleadings are of such detail that they can stand on their own. Again, we disagree. In an action for libel, "the petition must set out the particular defamatory words, or at

least their substance and meaning." *Murray V. Harris,* 112 S.W.2d 1091, 1094 (Tex.Civ.App.-Amarillo 1938, writ dism'd); *Rio Grande Valley Gas Co. V. Caskey,* 33 S.W.2d 848, 849-50 (Tex.Civ.App.-San Antonio 1930, no writ). Nowhere in Kahn's petition does he inform the court of the libelous matter nor does he set out the parts of the writing upon which the alleged libel is based. *Rio Grande Valley Gas Co.*, 33 S.W.2d at 849. In short, we are left only with Kahn's opinions and conclusions as to the libelous matter. We hold that the trial court did not abuse its discretion in granting Beicker's special exception and overrule Kahn's third point of error. *See Burgess* V. *El Paso Cancer Treatment Ctr.*, 881 S.W.2d *552* (Tex.App.-El Paso 1994, writ denied).

In his fourth point of error Kahn argues the trial court erred in granting the special exception because the pleadings include other causes of action besides libel. As Beicker points out, however, this argument is presented for the first time on appeal and therefore cannot be considered by this court. *See McDuffle V. Blassingame,* 883 S.W.2d 329, 335 (Tex.App.-Amarillo 1994, writ denied); Tex. R. APP. *P.52(a).* Kahn's fourth point of error is overruled.

DISMISSAL OF PLEADINGS

In his fifth point of error, Kahn argues that the trial court erred in granting the special exception because he did not have notice of the hearing. In Beicker's response to Kahn's Motion for New Trial/Motion to Retain, Beicker attaches the green card with the signature of Kahn's authorized agent, G. Davis, appearing in the box marked Signature (Agent). Also attached is an affidavit from Beicker's lawyer and his legal assistant attesting to the fact that the document (Defendant's First Amended Original Answer, which contained the fiat setting a hearing on Defendant's Special Exception) was mailed to Kahn. "When a letter, properly addressed and postage prepaid, is mailed, there

exists *a* presumption that the notice was duly received by the addressee." *Thomas V. Ray,* 889 S.W.2d 237, 238 (Tex. 1994) (orig. proceeding). The presumption may be rebutted with an offer of proof of nonreceipt from the addressee. "In the absence of any proof to the contrary, the presumption has the force of a rule of law." *Id.* Kahn has failed to bring forth any verified proof that he did not receive notice from Beicker and has therefore failed to rebut the presumption that the document was received. *Id.* Kahn's fifth point of error is overruled.

In his sixth point of error, Kahn argues that the trial court erred in granting a dismissal without any motion or notice of a hearing to dismiss. In the Order Granting Special Exception, however, the trial court specifically states "in the event Plaintiff fails to amend his Petition in conformity with this Order within 10 days from date hereof, this law suit shall be dismissed with prejudice as to the refiling of same.,' Judge McManus signed this order on August 12,1994. Kahn, who acknowledges receipt of this document, was thus put on notice by the trial court as to the consequences of not amending his pleadings. Accordingly, Kahn's sixth point of error is overruled.

Finally, Kahn argues that the trial court erred in dismissing because of the confusion caused by Beicker. Specifically he argues that because he had no notice of Beicker's special exception, he did not intentionally avoid the hearing. This argument is also presented for the first time on appeal and, therefore, cannot be considered by the appellate court. *See McDuffie V. Blassingame,* 883 S.W.2d 329, 335 (Tex.App.-Amarilio 1994, writ denied); *Tex.* R. App. P. *52(a).* Kahn's seventh point of error is overruled, and the judgment is affirmed.

Sarah B. Duncan Justice

Do Not Publish

No.94-CI-07723

BURTON KAHN	§	IN THE DISTRICT COURT OF
	§	
V.	§	BEXAR COUNTY, TEXAS
	§	
BEICKER ENGINEERING,	§	
INC., DAVY L.BEICKER,	§	
AND MICHAEL J. ZEZULA	§	166TH JUDICIAL DISTRICT

ORDER GRANTING SPECIAL EXCEPTION

On this day came on to be heard the Special Exception as contained in Defendants' First Amended Original Answer challenging the sufficiency of Plaintiff s Original Petition on the grounds that Plaintiff has failed to state a legally cognizable cause of action for libel.

The Defendants appeared by and through their respective attorney. The Plaintiff, though duly notified pursuant to the Texas Rules of Civil Procedure, failed to appear. The Court, having heard the arguments of counsel for the Defendants and having reviewed the pleading in question, has concluded and finds that the Special Exception should be sustained.

It is therefore, ORDERED, ADJUDGED and DECREED that the Special Exception made by the Defendants is sustained.

It is further ORDERED that the Plaintiff amend his Petition to state a legally cognizable cause of action for libel, within 10 days from date hereof.

It is further ORDERED, ADJUDGED and DECREED that in the event Plaintiff fails to amend his Petition in conformity with this Order within 10 days from date hereof, this law suit shall be dismissed with prejudice as to the refiring of same.

SIGNED this 12th day of August, 1994.

/s/ Don McManus

Judge Presiding

No.94-CI-07723

BURTON KAHN	§	IN THE DISTRICT COURT OF
	§	
V.	§	BEXAR COUNTY, TEXAS
	§	
BEICKER ENGINEERING,	§	
INC., DAVY L.BEICKER,	§	
AND MICHAEL J. ZEZULA	§	166TH JUDICIAL DISTRICT

ORDER OF DISMISSAL

On the 12th day of August, 1994, this Court entered an Order Granting Special Exceptions in which it ordered Plaintiff to amend his Petition to state a legally cognizable cause of action for libel within 10 days from the date of the Order. Plaintiff, though duly notified of said Order, failed to amend his Petition within said 10 day period.

It is, therefore, ORDERED, ADJUDGED and DECREED by the Court that the above-entitled and numbered cause be and the same is Dismissed with prejudice as to the refieng of same and that all costs incurred herein be paid by the Plaintiff.

SIGNED and ENTERED this___ day of AUG 25 1994

/s/Don McManus
Judge Presiding

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BURTON KAHN	§	IN THE DISTRICT COURT OF
	§	
V.	§	BEXAR COUNTY, TEXAS
	§	
BEICKER ENGINEERING,	§	
INC., DAVY L.BEICKER,	§	
AND MICHAEL J. ZEZULA	§	166TH JUDICIAL DISTRICT

ORDER DENYING MOTION FOR REINSTATEMENT

On the 21 st day of -September, 1994, came on to be considered a Motion for Reinstatement filed by Plaintiff, Burton Kahn. The Plaintiff appeared pro se, in person, and the Defendants, Beicker Engineering, Inc., Davy L. Beicker and Michael J. Zezula, appeared by their attorney of record. After considering the arguments of Plaintiff and counsel for the Defendants, it is the opnion of the Court that the Motion for Reinstatement filed by Plaintiff be denied. It is therefore ordered, adjudged and decreed that Plaintiffs Motion for Reinstatement is hereby and in all things Denied.

Signed this 21st day of September 1994.

/S;/ Don McManus
Judge Presiding

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(210) 822-6060
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/s/ Marc Gravely
WILLIAM H. QUIRK, III
State Bar No. 16438000
MARC E. GRAVELY
State Bar No. 00787582

No.94-CI-07723

BURTON KAHN	§	IN THE DISTRICT COURT OF
	§	
V.	§	BEXAR COUNTY, TEXAS
	§	
BEICKER ENGINEERING,	§	
INC., DAVY L.BEICKER,	§	
AND MICHAEL J. ZEZULA	§	166TH JUDICIAL DISTRICT

ORDER DENYING PLAINTIFF'S
MOTION TO FOR NEW TRIAL

On the 14 the day of October, 1994 came on to be considered a Motion for New Trial and Plaintiff's Second Motion to Reinstate filed by Plaintiff, Burton Kahn. After considering the arguments of Plaintiff and the counsel for the Defendants, it is the opinion of the Court that a New Trial and Plaintiff's Second Motion to Reinstate is denied.

It is therefore ordered, adjudged and decreed that a New Trial and Plaintiff's Second Motion to Reinstate be Denied.

Signed this the 14 day of October, 1994.

/s/ Don McManus
JUDGE PRESIDING

/s/ BURTON KAHN
/s/ Marc Gravely

THE SUPREME COURT OF TEXAS

Post Office Box 12248

Austin, Texas 78711 (512) 463-1312

~~April 25~~, 1996
May 31,

Mr. William H. Quirk, III
Beckmann & Quirk
1020 NE Loop 410, Suite 450
San Antonio, TX 78209

Mr. Solomon H. Smith
Beckmann & Quirk
1020 NE Loop 410, Suite 450
San Antonio, TX 78209

Mr. Marc E. Gravely
Beckmann & Quirk
1020 NE Loop 410, Suite 450
San Antonio, Tx 78209-1218

RE: Case Number 95-1282
Style: BURTON KAHN V. BEICKER ENGINEERING, INC., DAVY L. BEICKER, AND MICHAEL J. ZEZULA

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Respectfully yours,

JOHN T. ADAMS, CLERK
BY:/s/Michael C. Murphey, Deputy Clerk

cc: Mr. Burton Kahn

COURT OF APPEALS
FOURTH COURT OF APPEALS DISTRICT
300 DOLOROSA, SUITE 3200
BEXAR COUNTY CRIMINAL JUSTICE CENTER
SAN ANTONIO, TEXAS 78205
HERB SCHAEFER, CLERK
December 18, 1995

Burton Kahn
7003 Glen Trail
San Antonio, TX 78239

William H. Quirk, III
BECKMAN & QUIRK, P.C.
1020 N.E.Loop 410, Suite 450
San Antonio, TX 78209

Solomon H. Smith
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San Antonio, TX78209

Marc E. Gravely
BECKMAN & QUIRK, P.C.
1020 N.E. Loop 410, Suite 450
San Antonio, TX78209

RE: Court of Appeals Number: 04-94-00823-CV
Trial Court Case Number: 94-CI-07723

Style: Burton Kahn v. Beicker Engineering,Inc.;Davy L. Beicker; and Michael J. Zezula

Dear Counsel:

The Appellant's Second Motion for Rehearing EN BANC in the above styled and numbered cause has this date been DENIED.

Very truly yours,

HERB SCHAEFER, CLERK

/s/ JOYCE WIATREK, DEPUTY CLERK

No.94-CI-07723

BURTON KAHN	§	IN THE DISTRICT COURT OF
	§	
V.	§	BEXAR COUNTY, TEXAS
	§	
BEICKER ENGINEERING,	§	
INC., DAVY L.BEICKER,	§	
AND MICHAEL J. ZEZULA	§	166TH JUDICIAL DISTRICT

AFFIDAVIT OF BURTON KAHN, P.E.

THE STATE OF TEXAS
COUNTY OF BEXAR

BEFORE ME, the undersigned authority I on this day personally appeared BURTON KAHN, who after being first duly sworn, deposed and stated as follows:

"My name is BURTON KAHN, I am over the age of eighteen years, am of sound mind, have never been convicted of a felony or misdemeanor involving moral turpitude, and otherwise capable of making this affidavit. All the facts stated herein are with personal knowledge and are true and correct.

I never recived a copy of the Special Exceptions and Fiat for hearing on August 12, 1994.

Further, Affiant sayeth not.

/s/ BURTON KAHN,P.E.

SUBSCRIBED AND SWORN TO BEFORE ME on the 5th day of September, 1994, to certify which, witness my hand and seal of office.

My Commission Expires: 11-05-9

/s/ Aida Delgado
NOTARY PUBLIC, STATE OF TEXAS

COURT OF APPEALSFOURTH APPEALS DISTRICT OF TEXAS SAN ANTONIO, TEXAS

I, HERB SCHAEFER, CLERK OF THE FOURTH APPEALS DISTRICT, for the State of Texas, DO HEREBY CERTIFY that the foregoing is a true and correct copy of the originaI document in my Iawful custody and possession as appears of record filed 12-28-94 in my oofice. Witness my official hand and seal of office this 25th day of October 1995

HERB SCHAEFER, CLERK OF THE FOURTH APPEALS DISTRICT, for the State of Texas.

168

By/s/ Elise Dixon
Deputy Clerk

No.94-CI-07723

BURTON KAHN	§	IN THE DISTRICT COURT OF
	§	
V.	§	BEXAR COUNTY, TEXAS
	§	
BEICKER ENGINEERING,	§	
INC., DAVY L.BEICKER,	§	
AND MICHAEL J. ZEZULA	§	166TH JUDICIAL DISTRICT

PLAINTIFF'S MOTION TO REINSTATE

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, BURTON KAHN who makes, files and serves this Plaintiff's Motion to Reinstate cause and as grounds therefore, shows the following:

I.

The dismissal is based on a non appearance at a Special Exception Hearing and not amending Plaintiff's petition within 10 days of that hearing. Plaintiff attest that he never received the Special Exceptions and the Fiat. Exhibit A.

II

There were several letters in early August 1993 between Plaintiff and Defendants regarding discovery. Some of these letters were addressed with the wrong zip code. Exhibit B. When the wrong zip code is on an envelope it is not properly addressed as per Tex.R.Civ.P. 21(a).

III

Plaintiff received the letter with the attached Order granting Special Exceptions and called the Defendants attorney. Plaintiff was told that he had sent the Fiat and special exceptions and had a green card. Plaintiff sent letter dated August 21, 1993 Exhibit C regarding the problem. Plaintiff requested Defendant to send another copy to resolve the problem. Instead of responding Defendant sent the copy of a dismissal order.

WHEREFORE, premises considered, plaintiff prays the court to grant this motion to reinstate on the ground that Plaintiff was not notified in accordance with Tex.R.Civ.P. 21(a).

Respectfully submitted,

/s/ BURTON KAHN
Attorney Pro-Se
P.O. Box 35382
San Antonio, Texas 78235
Off (210) 532-6957
Fax (210) 532-4717

CERTIFICATE OF SERVICE

I hereby certify true and correct copies of this document have been served on all counsel of record pursuant to Rule 21a, Texas Rules of Civil Procedure.

DATE:

_/s/BURTON KAHN

Beckmann & Quirk
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San Antonio, Texas 78209
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Fax (210) 822-8446

FILED
OCT 2 1996
OFFICE OF THE CLERK

No. 96-338

IN THE
Supreme Court of the United States
October Term, 1996

BURTON KAHN,

Petitioner

v.

BEICKER ENGINEERING, INC., DAVY L. BEICKER AND MICHAEL J. ZEZULA,

Respondents

On Petition for Writ of Certiorari to
The Supreme Court of Texas

Brief in Opposition to the Petition for Writ of Certiorari to the Supreme Court of Texas

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QUESTIONS PRESENTED

The questions presented by Petitioner were never raised or ruled upon in the state trial, appellate or supreme courts of Texas; they were never passed on by those courts. These questions are raised for the first time in the Petition for Writ of Certiorari, and would not properly be before the Court if Certiorari were granted.

NOTE: Beicker Engineering, Inc. has no parent or subsidiary company.

TABLE OF CONTENTS

Questions Presented i

Table of Contents ii

Table of Authorities

- Cases ..... iii, iv
- United States Codes iv
- United States Supreme Court Rules iv
- Other Authorities v

Jurisdiction 2

Constitutional and Statutory Provisions Involved 3

Statement of the Case 4

Reasons for Denying the Writ 5

Conclusion 10

TABLE OF AUTHORITIES

CASES

Banker's Life v. Crenshaw,
486 U.S. 71 (1988) 7

Centennial Ins. v. Commercial Union Ins.,
802 S.W.2d 479 (Tex. App. —
Houston [14th Dist.] 1991, no writ) 8

Colorado v. Nunez,
465 U.S. 324 (1984) 7

Evans v. Reed,
430 U.S. 975 (1976) 7

Illinois v. Gates,
462 U.S. 213 (1983) 6

Monks v. New Jersey,
398 U.S. 71 (1970) 7

Runge v. Franklin,
10 S.W. 721 (Tex. 1889) 8

Smith v. Nguyen,
855 S.W.2d 163 (Tex. App. — Houston
[14th Dist.] 1991, no writ) 8

State Farm v. Duel,
324 U.S. 154 (1945) 6

TABLE OF AUTHORITIES (CONT'D)

CASES (CONT'D)

Street v. New York,
394 U.S. 576 (1969) 6

Tacon v. Arizona
410 U.S. 351 (1973) 5

Taylor v. Freeland & Kronz,
503 U.S. 638 (1992) 7

Webb v. Webb,
451 U.S. 493 (1981) 6

Yee v. Escondido,
503 U.S. 519 (1992) 5

UNITED STATES CODES

28 U.S.C. § 1257(2) 2

28 U.S.C. § 1257(a) 2

UNITED STATES SUPREME COURT RULES

Supreme Court Rule 14.1.(g)(i) 6

OTHER AUTHORITIES

Judiciary Act of 1789 6

No. 96-338

IN THE

Supreme Court of the United States

October Term, 1996

BURTON KAHN,

Petitioner

v.

BEICKER ENGINEERING, INC. DAVY L. BEICKER AND MICHAEL J. ZEZULA,

Respondents

On Petition for Writ of Certiorari to
The Supreme Court of Texas

Brief in Opposition to the Petition for Writ of Certiorari to the Supreme Court of Texas

Beicker Engineering, Inc., Davy L. Beicker and Michael J. Zezula respectfully make and file this their Brief in Opposition to the Petition for Writ of Certiorari to the Supreme Court of Texas filed herein by Burton Kahn and would respectfully show unto the Court as follows:

JURISDICTION

Petitioner attempts to invoke the jurisdiction of this Court without proper justification. 28 U.S.C. § 1257(2) was revised in 1988. No condition under 28 U.S.C. § 1257(a) exists.

The Texas state courts at the trial, court of appeals and Texas Supreme Court level did not consider or rule upon the constitutional issues that Petitioner attempts to raise in this Court. The questions Petitioner seeks to have reviewed were never raised in state courts. Petitioner attempts to raise these questions for the first time on Writ of Certiorari. The questions are not properly raised to invoke the jurisdiction of this Court. No condition under 28 U.S.C. 1257(a) exists. There is no conflict between courts nor is there an important matter of federal law presented that should be settled by this Court.

Since the questions presented by Petitioner are presented improperly, not having been raised or ruled upon in any state court, the questions are not properly raised in this Court.

STATEMENT OF THE CASE

Petitioner, Burton Kahn (hereinafter "Kahn"), filed suit against Beicker Engineering, Inc., Davy L. Beicker and Michael J. Zezula (hereinafter "Beicker"). The suit alleged libel rising from work Beicker had done as an engineering consultant concerning the adequacy of a certain concrete slab engineered by Kahn. Kahn, in his suit failed to allege any defamatory words used, or the date of publication or the person or persons to whom the supposed libel had been published.

Beicker filed and served Special Exceptions to Kahn's Petition, which were included in Beicker's First Amended Original Answer filed and served on July 30, 1994 (Tr. at 33) and, after setting the objections for hearing, filed and served the Answer containing the Special Exceptions, together with the Fiat or notice of setting for hearing, on August 3, 1994. The service and mailing with the Fiat was received by Kahn through his agent, which Kahn acknowledged. A copy of the signed U.S. Postal Service Domestic Return Receipt of delivery is contained in the record (Tr. at 189). Kahn failed to attend the hearing. The trial court sustained Beicker's Special Exceptions and gave Kahn ten (10) days to amend his petition, directing that failure to amend his petition would result in the petition being dismissed with prejudice (Tr. at 137).

On August 25, 1994, the trial court, acting in accordance with its prior Order sustaining the Special Exceptions — Kahn having failed to amend his pleadings — dismissed Kahn's cause of action (Tr. at 138). There was no Motion to Dismiss, nor was a hearing held on a Motion to Dismiss. No motion was required. Kahn, thereafter, filed with the trial court a Motion to Reinstate

and a Motion for New Trial and Second Motion to Retain (Tr. at 140, 154). Kahn attached to the Motion to Reinstate an Affidavit in which he denied having received both the Special Exceptions and the Fiat setting the hearing on same, despite the fact that the Special Exceptions and the Fiat were integral parts to the single document that he received, and that he acknowledged receiving (Tr. at 142). The trial court overruled both Motions (Tr. at 209).

Petitioner then appealed to the Fourth Court of Appeals in Bexar County, Texas. He filed an Appellant's brief and, after the court of appeals affirmed the trial court's dismissal, he filed a Motion for Rehearing, a Second Motion for Rehearing and a Second Motion for Rehearing *En Banc*, which were denied. Petitioner did not raise the questions relied upon in this Court either at the trial court or at the Texas Fourth Court of Appeals. Petitioner applied for Writ of Error to the Texas Supreme Court, raising the same questions ruled upon by the lower courts. The federal questions raised for the first time in this Court were not raised in the Texas Supreme Court nor were they ruled upon there.

REASONS FOR DENYING THE WRIT

Petitioner raises in the Petition for Writ of Certiorari two questions which were neither raised nor ruled upon in the Texas court of first instance or in the Texas appellate courts. If the claim was not raised or addressed in prior proceedings, the Court's practice would be to decline review. ***Yee v. Escondido***, 503 U.S. 519 (1992). ***See also Tacon v. Arizona*** 410 U.S. 351 (1973). Petitioner's Petition for Writ of Certiorari does not

comply with Supreme Court Rule 14.1(g)(i) which requires specification of the stage when the federal questions were raised, the method and manner of raising them and the way the questions were passed on by the state courts, with specific reference to the record showing where the matter appears.

Nowhere in Petitioner's Petition do any of the matters required by Supreme Court Rule 14.1(g)(1) appear. The purpose of this requirement is stated in the rule: "so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari." If the federal question raised in the U.S. Supreme Court was not presented in the state courts, the Supreme Court has no power to consider it. ***Street v. New York***, 394 U.S. 576 (1969).

The Judiciary Act of 1789 provided no jurisdiction in the absence of a federal question raised and decided in the state courts. If these criteria are not met, there is no jurisdiction. ***Illinois v. Gates***, 462 U.S. 213 (1983). ***See also State Farm v. Duel***, 324 U.S. 154 (1945). If the state court did not rule on a question the Supreme Court cannot consider it.

It is required that the Petitioner specify the stage, in both the court of first instance and the appellate court, at which the federal question was raised, the means of raising the question and the ruling. Where no federal question was ever presented, let alone passed upon, the Court has no jurisdiction. ***Webb v. Webb***, 451 U.S. 493 (1981). In ***Webb***, the Court stated it saw no reason to deviate from that rule.

This Court has, on a number of occasions, encountered similar situations in which the questions raised had not been raised in the state courts. The Supreme Court does not decide a question raised for the first time in the Supreme Court and not raised in the lower courts. ***Taylor v. Freeland & Kronz***, 503 U.S. 638 (1992). In ***Evans v. Reed***, 430 U.S. 975 (1976), the Court denied the Petition for Writ of Certiorari for want of a properly presented federal question. In ***Monks v. New Jersey***, 398 U.S. 71 (1970), a claim on a federal question raised for the first time in a Petition for Writ of Certiorari resulted in dismissal of the Writ as improvidently granted when the Court discovered the lack.

When the highest state court has not considered a question it will be assumed the omission was due to lack of proper presentation. ***Id. See also Colorado v. Nunez***, 465 U.S. 324 (1984).

The Supreme Court will not address claims of violations of the U.S. Constitution Due Process clause when the claims were not previously ruled upon below. There should be no doubt that a federal constitutional claim was made in the state courts and presented in the manner required by state law. ***Banker's Life v. Crenshaw***, 486 U.S. 71 (1988). The Petition for Writ of Certiorari should be denied for want of jurisdiction.

The Petition alleges dismissal of the Petitioner's cause of action resulting from Respondent's Motion to Dismiss in the trial court. In fact, as pointed out by the Texas Court of Appeals in its Opinion, the trial court dismissed because Petitioner (Plaintiff below) failed to amend his Petition in conformity with the Court's Order within ten (10) days of the date of the Order. The

Order granting Special Exceptions was sent to Petitioner and was received by him (Tr. at 177, 201-202). The Special Exceptions upheld by the trial court concerned the failure of the Petition in that court to allege, in the words used, the allegedly libelous matters complained of. In ***Runge v. Franklin***, 10 S.W. 721 (Tex. 1889), the Texas Supreme Court stated that "the very language relied on as libelous must be set out in a petition for libel." That rule has been followed in all cases involving allegations of libel.

Petitioner did receive, and acknowledged having received, the correspondence containing notice of hearing on Special Exceptions. He was, additionally, charged with notice of all steps taken and in the file. ***Smith v. Nguyen***, 855 S.W.2d 163 (Tex. App. — Houston [14th Dist.] 1991, no writ). In ***Centennial Ins. v. Commercial Union Ins.***, 802 S.W.2d 479 (Tex. App. — Houston [14th Dist.] 1991, no writ), the Texas Fourteenth Court of Appeals correctly stated the law that applies:

> Under the Texas Rules of Civil Procedure, the proper way for a defendant to urge that a Plaintiff has failed to plead a cause of action is by special exception....
>
> [T]he pleader must be given an opportunity to replead.... [A]fter special exceptions have been sustained and a party has been given an opportunity to amend its pleadings, the case may be dismissed.... ***Id.***

The Writ petitioned for should be denied. The questions presented for review cannot confer jurisdiction because they were never raised in the Texas state courts and, therefore, not decided there. The Court has consistently refused to decide such issues not raised in state courts. That should be the result in the present case.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully Submitted
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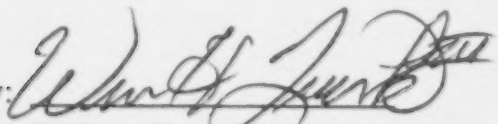
By: 
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